

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

GWYNN D. PERRY)	
Claimant)	
VS.)	
)	
McDONALDS)	Docket No. 198,879
Respondent)	
AND)	
)	
AMERICAN FAMILY MUTUAL INSURANCE CO.)	
Insurance Carrier)	

ORDER

Claimant appeals from an Award entered by Administrative Law Judge Jon L. Frobish on February 7, 1997. The Appeals Board heard oral argument July 11, 1997, in Wichita, Kansas.

APPEARANCES

Claimant appeared by her attorney, Garry L. Howard of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Lyndon W. Vix of Wichita, Kansas.

RECORD AND STIPULATIONS

The Appeals Board reviewed and considered the record listed in the Award of the Administrative Law Judge. The Appeals Board also adopted the stipulations listed in that Award.

ISSUES

The sole issue to be considered on appeal is the nature and extent of claimant's disability. The Administrative Law Judge limited claimant's award to functional impairment. Claimant argues that she is entitled to a work disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board finds that the decision by the Administrative Law Judge should be modified, and claimant should be awarded benefits for a work disability of 17 percent.

Claimant began working for respondent in June of 1992 as a swing manager and, in approximately January of 1993, was promoted to second assistant manager, a salaried position. Claimant suffered injury arising out of and in the course of her employment on December 23, 1994. Claimant experienced back pain down into her left leg while carrying a bucket of ice to the front of the store.

Claimant was initially treated at the Minor Emergency Center. She was taken off work for four days and received physical therapy. Claimant was also treated by Anthony G. A. Pollock, M.D., and Robert L. Eyster, M.D. Dr. Eyster initially limited claimant to working no more than six hours per day. Dr. Pollock continued that restriction and also prescribed physical therapy, medication, and home exercises.

At the direction of her treating physicians, claimant worked a reduced schedule. Because of the reduced schedule, respondent changed claimant's position from salaried to hourly. Claimant testified that her back bothered her while working the reduced schedule. Citing work performance problems, respondent terminated claimant's employment in August of 1995.

The Administrative Law Judge found that claimant was terminated for poor performance, and on that basis, concluded that claimant should not be awarded work disability benefits. The Appeals Board concludes that claimant should be awarded work disability benefits. First, the evidence establishes that claimant did not at any time after her injury earn 90 percent of her preinjury wage. The reduced hours caused her to be limited to less than 90 percent of her preinjury wage. K.S.A. 44-510e limits a claimant to functional impairment when the postinjury wage is 90 percent or more of the preinjury wage.

In addition, the Appeals Board concludes that claimant's work restrictions would have prevented her from continuing to work at McDonalds in the position she occupied at the time of her injury. Claimant worked nine hours per day, five days per week. Claimant testified, and the Appeals Board finds, that claimant was required to be on her feet a minimum of eight hours out of the nine-hour shift. Her supervisor, Doris Folsom, agreed that claimant could not do the job if she could not be on her feet more than six hours of a nine-hour day.

Paul D. Lesko, M.D., placed a permanent restriction on claimant that prohibited her from standing or walking in excess of four hours out of an eight-hour work day. Dr. Phillip R. Mills, the court-appointed independent medical examiner, also permanently restricted claimant to standing or walking not more than four to six hours per day. The treating physician, Dr. Pollock, did not impose similar restrictions. However, his deposition testimony does not convincingly contradict those restrictions. He testified that claimant probably would be able to return to a nine-hour shift. He also indicated that the restrictions by Drs. Lesko and Mills were not inappropriate but were simply a personal opinion by those practitioners. He found the complaints claimant gave of low back pain while standing in excess of five to six hours consistent with her low back strain. The Board finds that reasonable restrictions would have precluded claimant from returning to her preinjury employment. As claimant was not offered accommodated work within those restrictions, the wage in claimant's preinjury employment cannot be imputed to her under the principles of Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

The Appeals Board does not agree, on the other hand, with the extent of work disability proposed by claimant's counsel. Claimant's counsel urges the Board to find a 29.8 percent work disability. K.S.A. 44-510e establishes the following criteria for determining the extent of work disability:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury."

As indicated, the loss of ability to perform tasks must be established on the basis of the physician's opinion. In this case, Dr. Pollock did not recommend restrictions but suggested that a 35-pound lifting restriction might be reasonable. He agreed that she probably could do "pretty much" the same tasks she had done before the injury. The Appeals Board has, as indicated, found more convincing the restrictions of Drs. Lesko and Mills.

Dr. Lesko recommended claimant limit standing and walking to three to four hours in an eight-hour day and limit lifting to 15 to 20 pounds. Dr. Lesko testified claimant was unable to do 4 of her 31 preinjury job restrictions which computes to a 13 percent task loss.

Dr. Mills recommended claimant limit standing and walking to a maximum of four to six hours in an eight-hour day. Dr. Mills reviewed a list of tasks prepared by Mr. James Molski. Claimant testified that this list represented the various tasks she had performed over the last 15 years. Dr. Mills identified those tasks which he felt she could no longer do

because of restrictions he recommended. Dr. Mills testified that she could perform 26 of the 31 tasks, a reduction of 16 percent. The Appeals Board finds that claimant lost the ability to perform 14.5 percent of the tasks she had performed in her 15 year work history.

Claimant's counsel argues for a higher percentage based upon the limitation in the length of time claimant could stand or walk. He contends that since claimant could not stand or walk, according to Dr. Mills' restrictions, more than four to six hours in an eight-hour day, she has a 25 percent loss of ability to do those various tasks.

Without intending to suggest that time limits such as those imposed on claimant would not have, in some cases, an effect on a claimant's ability to perform tasks, the Appeals Board finds the evidence in this case unconvincing. Claimant is not able to point to any particular task that would be eliminated. There is, for example, no indication which tasks in the 15-year history would be required to be performed consecutively while standing or walking without an opportunity for a break. In addition, the claimant's position is not convincingly supported by the opinion of a physician. The only physician who gives some support is Dr. Mills. When asked by claimant's counsel whether it would be reasonable to treat the loss as a 25 percent loss of ability to perform tasks, Dr. Mills first states it is a novel question and then states "it certainly seems reasonable . . . but it's an interesting question, interesting concept." The Appeals Board concludes the evidence in this case does not establish a task loss for the time limits on standing and, as indicated, finds the task loss to be 14.5 percent.

The Appeals Board finds that claimant sustained a wage loss of 19.4 percent. Claimant's average weekly wage at the time of her injury was \$390.01. After leaving McDonalds, claimant obtained employment at Albertsons within the restrictions of both Dr. Mills and Dr. Lesko. The parties have stipulated that claimant's postinjury average weekly wage is \$314.38.

Averaging together the wage loss and tasks loss as required by K.S.A. 44-510e, the Appeals Board finds that claimant has a 17 percent work disability and is entitled to benefits on that basis.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Jon L. Frobish, dated February 7, 1997, should be, and is hereby, modified.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Gwynn D. Perry, and against the respondent, McDonalds, and its insurance carrier, American Family

Mutual Insurance Company, for an accidental injury which occurred December 23, 1994, and based upon an average weekly wage of \$390.01 for 15.43 weeks of temporary total disability compensation at the rate of \$78.59 per week or \$1,212.65, followed by 70.48 weeks at the rate of \$260.02 per week or \$18,326.21, for a 17% permanent partial general disability, making a total award of \$19,538.86 all of which is due and owing and should be paid in one lump sum less amounts previously paid.

The Appeals Board approves and adopts all other orders made by the Administrative Law Judge not inconsistent herewith.

IT IS SO ORDERED.

Dated this ____ day of July 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Garry L. Howard, Wichita, KS
Lyndon W. Vix, Wichita, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director